



# *CASE CLIPS*

Selected decisions of the Indiana appellate courts abstracted for judges by the Indiana Judicial Center.

**VOL. XXIX, NO. 7**

**February 22, 2002**

## **CRIMINAL LAW ISSUES**

**BENSON v. STATE, No. 49S00-9910-CR-631, \_\_\_ N.E.2d \_\_\_ (Ind. Feb. 15, 2002).**  
**DICKSON, J.**

Over objection, the trial court also permitted the State to present the testimony of a police detective that testifying inmates in some cases are subjected to abuse and physical assault by other inmates.

The defendant argues that there was no evidence of threats to the witness and no evidence that the defendant, who was also incarcerated in the same jail, even knew that the witness was also incarcerated there. Citing Cox v. State, 422 N.E.2d 357 (Ind. Ct. App. 1981), the defendant argues that the State's questioning constituted an extremely prejudicial evidentiary harpoon that requires reversal and a new trial.

In Cox, the State on direct examination elicited testimony of threats made against a witness's life if he testified in the case. [Citation omitted.] Noting the absence of any evidence suggesting that Cox was responsible for or had knowledge of the threats, the Court of Appeals found "the improper admission of such highly prejudicial testimony [to be] reversible error." [Citation omitted.] A principal concern in Cox was that such threats "tend to show guilty knowledge or an admission of guilt" on the part of the defendant, thus requiring a proper foundational showing that the threats "were made either by the defendant or with his or her knowledge or authorization." [Citation omitted.] Cox emphasized that evidence of threats made by *unidentified* third persons usually lacks a sufficient connection to the defendant to be admissible. [Citation omitted.] Noting that testimony regarding threats not attributable to a defendant may be intended only to show "some unwritten prison code among inmates which places in physical peril any inmate who acts as a prosecution witness," the Cox court observed that, even if the jury were instructed to narrowly construe the threats, "we believe such an instruction could not have cured the error." [Citation omitted.]

In the present case, there is no evidence that the witness received *any* threats whatsoever, which makes the State's trial strategy particularly questionable. The prosecutor's questions and evidence encouraged the jury to unfairly speculate, without any evidentiary support or foundation, that any unfavorable aspects of the witness's testimony were attributable to his fear of inmate retribution. To condone this trial tactic would put at risk the credibility of every witness who testifies during incarceration. Any party seeking to discredit such a witness would thus be able, without substantiation, to unfairly imply to a jury that the witness was being less than truthful.

....  
In the present case, the prosecutor's questions and evidence did not directly allege that the witness was fearful due to threats connected to the defendant, but did clearly imply, without any substantiating foundation in the record, that the witness's trial testimony was untruthful due to his fear of retribution. . . . [W]e cannot approve of the questioning permitted here.

....  
SHEPARD, C. J., and BOEHM, RUCKER, and SULLIVAN, JJ., concurred.

**WILLIAMS v. STATE, No. 49S05-0108-CR-378, \_\_\_ N.E.2d \_\_\_ (Ind. Feb. 15, 2002).**  
SHEPARD, C. J.

Detective Witten approached Williams and purchased a rock of crack cocaine for \$20.



As he began to walk away from Witten, Williams saw several police cars coming toward him. He “cut out running” toward a building where his brother lived about a hundred yards away. [Citation to Record omitted.] His knock went unanswered, so he locked himself in the empty apartment across the hall.

....  
[T]he State charged Williams with residential entry and possession of cocaine as class D felonies in Marion Superior Court 9 (the “Court 9 charges”). Williams agreed to plead guilty to possession of cocaine as a class D felony and serve 915 days in jail. In return, the State agreed not to file “habitual or B felony” charges against him. [Citation to Record omitted.] This deal was apparently negotiated on December 8<sup>th</sup> or 10<sup>th</sup>. [Footnote omitted.] On December 29, 1998, the court entered judgment of conviction. . . .

In the meantime, on December 16, 1998, the State had filed charges against Williams in a different room of the same court. It alleged dealing cocaine within 1,000 feet of a school as a class A felony and possession of cocaine within 1,000 feet of a school as a class B felony (the “Court 20 charges”). . . .

It is unclear why the plea agreement was not withdrawn after the Court 20 charges were filed, except that there was a fair amount of confusion on both sides. . . .

....  
We conclude that the Court 20 charges were barred by Indiana’s successive prosecution statute, . . . .

Indiana Code Ann. § 35-41-4-4(a) (West 1998) provides:

A prosecution is barred if all of the following exist:

- (1) There was a former prosecution of the defendant for a different offense or for the same offense based upon different facts.
- (2) The former prosecution resulted in an acquittal or a conviction of the defendant or in an improper termination under section 3 [IC 35-41-4-3] of this chapter.
- (3) The instant prosecution is for an offense with which the defendant *should have been charged* in the former prosecution.

Williams’ circumstances satisfy the first two statutory provisions. Williams was convicted in a former prosecution for possession of cocaine as a result of his October 12<sup>th</sup> arrest. Thus, the outcome of this case centers on whether the instant prosecution is for offenses with which Williams *should have been charged* in the previous prosecution.

The words “should have been charged” must be read in conjunction with Indiana’s joinder statute. Sharp v. State, 569 N.E.2d 962, 967 (Ind. Ct. App. 1991) (citing State v. Burke, 443 N.E.2d 859 (Ind. Ct. App. 1983)). The joinder statute provides in relevant part:

A defendant who has been tried for one (1) offense may thereafter move to dismiss an indictment or information for an offense which could have been joined for trial with the prior offenses under section 9 of this chapter.<sup>4</sup> The motion to dismiss shall be made prior to the second trial, and shall be granted if the prosecution is barred by reason of the former prosecution.

Ind. Code Ann. § 35-34-1-10(c) (West 1998) (footnote added). Our Court of Appeals has characterized the statute this way: “Thus, our legislature has provided that, where two or more charges are based on the same conduct or on a series of acts constituting parts of a single scheme or plan, they *should* be joined for trial.” State v. Wiggins, 661 N.E.2d 878, 880 (Ind. Ct. App. 1996) (emphasis in original). This statutory scheme “provid[es] a check

upon the otherwise unlimited power of the State to pursue successive prosecutions.” [Citation omitted.] Where the State chooses to bring multiple prosecutions for a series of acts constituting parts of a single criminal transaction, it does so at its own peril.

....  
The trial court found that Williams’ entry into a locked apartment after fleeing police was an “intervening act . . . sufficient enough for them to have two separate cases.” [Citation to Record omitted.] . . .

The record reveals that after buying the cocaine Detective Witten radioed Williams’ description and sent Officer Weaver “up there.” [Citation to Record omitted.] During a pre-trial hearing Williams testified that when he turned around “and took a few steps” five or six police cars had arrived. [Citation to Record omitted.] He ran and the police pursued him into an unoccupied apartment. [Citation to Record omitted.]

These facts show that the Court 9 and Court 20 charges were based on a series of acts so connected that they constituted parts of a single scheme or plan. Therefore, they should have been charged in a single prosecution.

....

---

<sup>4</sup> Code Ann. § 35-34-1-9 (West 1998) provides in relevant part:

(a) Two (2) or more offenses may be joined in the same indictment or information, with each offense stated in a separate count when the offenses . . . (2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

BOEHM, DICKSON, RUCKER, and SULLIVAN, JJ., concurred.

**DAVIDSON v. STATE, No. 22S01-0101-PC-42, \_\_\_ N.E.2d \_\_\_ (Ind. Feb. 19, 2002).**

BOEHM, J.

Johnie E. Davidson was tried in a single proceeding for several different crimes occurring in four separate instances at four different locations. After being found guilty of all charges except one, he was given consecutive sentences totaling 81 years. On appeal from the denial of postconviction relief, the Court of Appeals found Davidson’s trial counsel ineffective for failing to move for separate trials that, if granted, would have prevented the imposition of consecutive sentences. Davidson v. State, 735 N.E.2d 325, 329 (Ind. Ct. App. 2000). Although we agree with the Court of Appeals that a severance could have precluded consecutive sentences under the then-governing law, we believe Davidson’s counsel’s failure to seek a severance was not substandard performance under the circumstances.

....  
At trial, the defense sought to make much of the differences in descriptions of the perpetrators of the four separate robberies, suggesting that the State, in its zeal to get a conviction, had seized the wrong man. . . . Davidson’s counsel argued that the police were under a great deal of pressure to find the person or persons who committed these crimes and rushed to judgment in charging Davidson. Indeed, trial counsel was successful in gaining an acquittal for the robbery at Ace Food Mart.

. . . The postconviction court made no specific finding as to whether the decision was the product of strategy or oversight, but denied relief on the basis that trial counsel provided effective representation. On this record we cannot say that finding was unsupportable, and we therefore find Davidson has not met the first prong of the Strickland test.

....  
DICKSON and RUCKER, JJ., concurred.

SULLIVAN, J., filed a separate written opinion in which he concurred and in which SHEPARD, C. J., joined, in part, as follows:

I believe that Buell [v. State, 668 N.E.2d 251 (Ind. 1996), reh'g denied] and Elswick [v. State, 706 N.E.2d 592 (Ind. Ct. App. 1999), transfer denied] make clear that Davidson is not entitled to sentencing relief. The charges upon which the sentences at issue were imposed are of similar character and were charged in the same information. Even had Davidson been tried separately, there is no reason to think that he would not have been tried in the same court before the same judge. These factors indicate that the Kendrick [v. State, 529 N.E.2d 1311 (Ind. 1988)] rule is not applicable here.

### CIVIL LAW ISSUE

**TINCHER v. DAVIDSON, No. 49S05-0011-CV-719, \_\_\_ N.E.2d \_\_\_ (Ind. Feb. 19, 2002).**  
DICKSON, J.

In this comparative fault case, the trial court declared a mistrial due to repeated calculation inconsistencies in the verdict forms returned by the jury. The plaintiff appealed, alleging that the trial court erred by failing to enter judgment on the jury's general verdict and by declaring a mistrial. The Court of Appeals affirmed, Tincher v. Davidson, 731 N.E.2d 485 (Ind. Ct. App. 2000), and we granted transfer, 741 N.E.2d 1259 (Ind. 2000) (table).

....

The jury twice attempted to return a final verdict. The jury first returned Verdict Form A finding for the plaintiff and against the defendant and assessing the plaintiff's damages in the sum of "ONE HUNDRED FIFTY THOUSAND dollars, (\$150,000)," Record at 221, along with the completed calculation form indicating the defendant's fault percentage to be "100 %," the plaintiff's fault percentage to be "0 %," the plaintiff's total damages to be "\$1500.00," and the calculation showing total damages of "\$1500" times the fault charged to the defendant of "100 %," resulting in the plaintiff's recovery of "\$150000," id. at 219-20. The trial court [footnote omitted] noted the inconsistency, conferred with counsel, and then informed the jury as follows:

There was some inconsistency in the verdict forms and it's difficult to determine what the jury intended. We're going to give you new verdict forms, ask that you go back, read the forms, and reconsider, and that's what we're going to ask you to do. . . .

[Citation to Record omitted.] After further deliberations, the jury again returned a general verdict of \$150,000 but revised its calculation form to indicate the plaintiff's total damages of \$75,000, times the 100% fault allocated to the defendant, resulted in a plaintiff's recovery of \$150,000. The judge, finding that the numbers on the jury calculation form "don't work," granted the defendant's motion for a mistrial. [Citation to Record omitted.]

We first observe that this and similar jury difficulties present difficult challenges for trial courts, particularly when the jury is not deadlocked but has reached a unanimous resolution. Here, when the first verdict was returned, the trial court, after consulting with counsel, chose to direct further deliberations and told the jury that its verdict and calculation form were inconsistent and that it should re-read and complete a new set of verdict and calculation forms. The court apparently believed that it was limited either to this communication, or to declare a mistrial and discharge of the jury. To the contrary, we would encourage trial courts to employ other and creative approaches to assist and enable juries to resolve difficulties. Justice O'Connor makes the point clearly:

As we approach the 21st century, however, we need to make sure we do not remain so wedded to practices hailing from the 20th, or the 18th, or the 13th, that we make it difficult for juries to do their job well. . . .

[Citation omitted.]

Trial courts are required to respond to jury inquiries "as to any point of law arising in the case." Ind.Code § 34-36-1-6. In addition, our new Indiana Jury Rule 28 urges that trial judges facilitate and assist jurors in the deliberative process, in order to avoid mistrials. [Footnote omitted.] Under appropriate circumstances, and with advance consultation with the parties and an opportunity to voice objections, a trial court may, for example, directly seek further information or clarification from the jury regarding its concerns, may directly answer the jury's question (either with or without directing the jury to reread the other instructions), may allow counsel to briefly address the jury's question in short supplemental arguments to the jury, or may employ other approaches or a combination thereof.

The plaintiff contends that the mathematical discrepancy is of no effect as the general verdict controls. . . . [T]he plaintiff argues that information outside the general verdict cannot be used to impeach the verdict and that the extraneous information should be disregarded leaving a consistent judgment. [Footnote omitted.] The defendant urges that the trial court's discretionary grant of a mistrial was proper because the persistent differences between the jury's general verdict and its computation form constituted an inconsistent verdict that amounted to a logical absurdity.

We acknowledge a facial tension between Trial Rule 49 and the Comparative Fault Act. The rule unequivocally declares: "Special verdicts and interrogatories to the jury are abolished." T.R. 49. This rule reflects our profound respect for the right to trial by jury and the collective judgment of each jury. . . .

In contrast to the rule's prohibition of special verdicts and jury interrogatories, however, the Comparative Fault Act states:

The court shall furnish to the jury forms of verdicts that require only the disclosure of:

- (1) the percentage of fault charged against each party and nonparty; and
- (2) the amount of the verdict against each defendant.

If the evidence in the action is sufficient to support the charging of fault to a nonparty, the form of verdict also shall require a disclosure of the name of the nonparty and the percentage of fault charged to the nonparty.

[Citation omitted.]

The plaintiff argues that when legislative enactments regarding court procedure are incompatible with the Indiana Trial Rules promulgated by this Court, the latter controls. [Citation omitted.] Whenever possible, however, we prefer to construe statutory provisions in such a manner as to permit their application consistent with our procedural rules.

. . . .

[T]he legislature amended the Comparative Fault Act to equip trial courts to assist juries in resolving inconsistencies between a jury's verdict and its determination of total damages and the percentage of fault:

[W]henever a jury returns verdicts in which the ultimate amounts awarded are inconsistent with its determinations of total damages and percentages of fault, the trial court shall:

- (1) inform the jury of such inconsistencies;
- (2) order the jury to resume deliberations to correct the inconsistencies; and

(3) instruct the jury that the jury is at liberty to change any portion or portions of the verdicts to correct the inconsistencies.

Ind.Code § 34-51-2-13. While trial courts must at least take these steps in the event of such inconsistencies, this statute does not supersede and limit the available alternatives. As discussed above, trial courts should facilitate and assist jurors in the deliberative process in order to avoid mistrials.

....

In the present case, the jury first returned a general verdict accompanied by the calculation form that was internally inconsistent. . . . After further deliberations, the jury returned a new general verdict in the same amount, \$150,000.00, as its first general verdict. This second verdict was accompanied with a new calculation form that contained a mathematical calculation error but, like its first calculation form, reported that the jury determined that the defendant was 100% at fault and that the "Plaintiff's recovery" was to be \$150,000.00. To the extent that there was any residual inconsistency between the second general verdict and its accompanying calculation form, we hold that trial court may have, but was not required, to make further attempts pursuant to Indiana Code § 34-51-2-13, or otherwise, to assist the jury in achieving complete consistency. The general verdict expressed the jurors' unanimous intent to award a judgment of \$150,000.00 to the plaintiff.

The verdict itself was not internally inconsistent, illogical, or impossible. In accordance with [State Highway Dep't v.] Snyder [594 N.E.2d 783 (Ind. 1992)] and Buckland v. Reed, 629 N.E.2d 1241 (Ind. Ct. App. 1994)], the general verdict should not have been impeached by the calculation form. We conclude that the trial court erred in declaring a mistrial.

We remand this case to vacate the order granting a mistrial and to enter judgment on the jury's general verdict for the plaintiff in the amount of \$150,000.00.

SHEPARD, C. J. and BOEHM, J., concurred.

SULLIVAN, J., filed a separate opinion in which he concurred in the result and in which RUCKER, J., concurred, in part, as follows:

I agree that the jury's general verdict here should not have been impeached by the calculation form and, as such, judgment should be entered for the plaintiff in the amount of \$150,000.

I write to express my opposition to the majority's "urg[ing]" trial court judges "to facilitate and assist jurors in the deliberative process, in order to avoid mistrials." I do not think it proper, advisable, or (perhaps) constitutional for judges to "facilitate and assist" in jury deliberations absent the consent of the parties.

I acknowledge that the majority's view reflects the spirit of our new Jury Rule 28. As the majority's opinion reflects, Jury Rule 28 (adopted over Justice Rucker's and my dissent and over the contrary unanimous recommendation of our Supreme Court Committee on Rules of Practice and Procedure) is grounded in a goal of improved efficiency – a desire to avoid mistrials. Certainly we should strive for improved efficiency. But I believe that the prejudice to the parties and our system of trial by jury of allowing – indeed "urg[ing]" – judges "to facilitate and assist" in jury deliberations outweighs any benefits of improved efficiency in this regard.

CASE CLIPS is published by the  
Indiana Judicial Center  
National City Center - South Tower, 115 West Washington Street, Suite 1075  
Indianapolis, Indiana 46204-3417  
Jane Seigel, Executive Director  
Michael J. McMahon, Director of Research  
Thomas R. Hamill, Staff Attorney  
Thomas A. Mitcham, Production  
The Judicial Center is the staff agency for the Judicial Conference of Indiana and serves  
Indiana Judges and court personnel by providing educational programs,  
publications and research assistance.